NO. 43440-7-II

COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

ADRIAN JESS KRAMER,

Appellant.

BRIEF OF APPELLANT

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Assignment of Error

Substantial evidence does not support any of the burglary convictions and the trial court's acceptance of the jury's guilty verdicts on the burglary charges violated the defendant's right to due process under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment.

Issues Pertaining to Assignment of Error

If substantial evidence does not support any of a number of burglary convictions at a retail store based upon the failure to give an adequate trespass notice to the defendant, does a trial court's acceptance of a jury's guilty verdicts on those burglary charges violate that defendant's right to due process under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment?

STATEMENT OF THE CASE

Factual History

On December 12, 2009, a store security officer at the Longview Fred Meyers by the name of Duane McCabe caught the defendant Adrian Jess Kramer shoplifting and took him into the store security office. RP 163-165. Mr. McCabe then took the defendant's photograph, filled out a "Criminal Trespass Notice" and had the defendant initial and sign the document. *Id.*; Trial Exhibit 13. During this process, he told the defendant that he was "indefinitely" banned from coming into Fred Meyers. RP 165. However, he did not give the defendant a copy of the notice. *Id.*

About 15 months later, on March 18, 2011, another security officer at the Longview Fred Meyers followed a suspected shoplifter through the store as he put items in his basket. RP 187-190. That person then went to the shoe department, put on a new pair of tennis shoes, and walked towards one of the exits with his basket. *Id.* Once at the door, the suspect set the basket down and walked out of the store wearing the new shoes without paying for them. RP 190-192. The security officer then confronted the suspect, who exclaimed "I didn't do anything, I didn't do anything," just before he ran out into the parking lot and got away. *Id.* Under Fred Meyer regulations, store security officers may not pursue shoplifters out into the parking lot. RP 57-60. This store security officer later identified the defendant as the person he

saw run off after having stolen the new tennis shoes. RP 192-194.

On May 24, 2011, a security officer at the Longview Fred Meyers store was following a suspected shoplifter in the store and saw him attempt to take electronic surveillance tags off of merchandise. RP 199-202. With the store security officer watching, the suspect then walked past him and out of the store. *Id.* This security officer later identified the defendant as the person he had seen in the store attempting to disable security devices. *Id*

According to store security personnel at the Longview Fred Meyers store, a similar incident occurred on June 21, 2011, when they followed a suspected thief around the store as he put items in a cart and pushed it and the items out an exit door without paying. RP 202-205. On this occasion, the two security officers were able to confront the suspect and grab the cart. RP 204-208. This suspect then said "Don't fucking touch me." *Id.* As he did, a hunting knife in a sheath fell from his coat. *Id.* The suspect then fled across the street and got away while yelling obscenities at the security employees. *Id.* One of these employees later identified the defendant as the thief. RP 211-213.

Finally, on December 12, 2011, a trainee store security officer by the name of Michael Taylor was working the floor at the Longview Fred Meyers when he saw a person he suspected of shoplifting. RP 117-124. Upon seeing this person he called David Morrison, the manager of the security

department. *Id.* After training store cameras on the suspect, Mr. Morrison came down onto the sales floor and helped Mr. Taylor follow the suspected thief. RP 60-67. At one point, the suspect pushed his cart out into the garden center. *Id.* After a brief period, he returned into the main store without having put any further items in the cart. *Id.* The suspect then pushed his cart out of the double set of exit doors without paying for any of the items he had taken. RP 68-71. As he did this Mr. Morrison walked up briskly behind him. RP 70-74. Mr. Taylor was a few paces behind. *Id.*

Although Mr. Morrison did not remember making any statements to the suspect, he did apparently say "Hey" as he walked up as Mr. Taylor and another Fred Meyer employee did hear him say the word. RP 72-74, 146, 266-273. Whether or not he said anything, as he caught up, the suspect turned around and in a fluid motion swung a hatchet at Mr. Morrison's head. RP 70-74, 129-132, 266-273. Seeing the movement, Mr. Morrison tried to lean out of the way. *Id.* However, he did not lean enough and the hatchet cut off the majority of his left ear. *Id.* Once he felt the blow, Mr. Morrison grabbed his injured head, stepped back, and went down to one knee. RP 70-74. As he did, the suspect held the hatchet up to Mr. Taylor and said something along the line of "Get the fuck away from me." RP 129-132. In fact, Mr. Taylor had seen the suspect swing the hatchet and hit Mr. Morrison. *Id.* According to Mr. Taylor, the suspect appeared to have a startled look on

his face as if he were in shock at what he had done to Mr. Morrison. *Id.* When the suspect spoke, Mr. Taylor put his hands up and backed away to help Mr. Morrison. *Id.* The suspect then turned around and pushed his cart out into the parking lot. RP 131-132, 179-180, 257-261.

A number of Fred Meyer customers were present and saw what happened. RP 170-182, 256-262. One of these customers was just walking into the store when he saw the incident. RP 174-182. He immediately returned to his truck, retrieved his handgun, loaded it, and went looking for the suspect. *Id.* Within a few minutes he found the person loading the items from the cart into a Honda with another person in it. *Id.* The suspect then got into the vehicle and drove away before the customer with the pistol could intervene. *Id.* Both he and another person in the parking lot saw the vehicle and noted that the license plate number was 431 YJJ. RP 112, 191, 222.

The vehicle with license 431 YJJ is registered to the defendant's girlfriend. RP 231-236. Police later found it, had it towed to the police department, and searched it subject to a warrant. RP 341-368. Although they found a number of the items stolen from Fred Meyers in the trunk, along with a little blood on a wrench, they did not find the hatchet. RP 350-368. Two days later, Longview Police Officers arrested the defendant. RP 385-393. Both Mr. Morrison and Mr. Taylor, as well as the witnesses in the parking lot and employees in the store identified the defendant as the person

who pushed the cart out of the store and cut off Mr. Morrison's ear. RP 72-72, 137-138, 179-180.

Procedural History

By information filed December 14, 2011, and thrice amended, the Cowlitz County Prosecutor charged the defendant with first degree assault, first degree robbery and first degree burglary for the incident on December 12, 2011. CP 1-3, 7-10, 23-27, 30-34. Each charge included a deadly weapon enhancement claim. *Id.* In addition, each count alleged the following aggravating factors:

> (1) the victim's injuries substantially exceed the level of bodily harm necessary to satisfy the element of the offense,
>
> (2) the defendant demonstrated or displayed an egregious lack of remorse,
>
> (3) the offense involved a destructive and foreseeable impact on persons other than the victim,
>
> (4) the defendant's prior unscored misdemeanor or prior unscored foreign criminal history results in a presumptive sentence that is clearly too lenient,
>
> (5) the defendant committed multiple current offenses and the defendant's high offender score results in some of the current offenses going unpunished, and
>
> (6) the failure to consider the defendant's prior criminal history which was omitted from the offender score calculation . . . result is a presumptive sentence that is clearly too lenient.

CP 30-34.

The state also charged the defendant with three counts of second degree burglary for the shoplifting incidents on March 18th, May 24th, and June 21st of 2011. *Id.*

This case was later called for trial before a jury, during which the state called 17 separate witnesses, including David Morrison, Michael Taylor, the store security officers from the preceding three shoplifting incidents, as well as the two witnesses in the parking lot and a number of other witnesses and police officers. RP 52-406. These witnesses and officers testified to the facts set out in the preceding factual history. *See* Factual History.

Following the close of the state's case, the defense rested without calling any witnesses. RP 407, 411-412. The court then instructed the jury with the defense taking exception to the court's refusal to give the defendant's proposed lesser included instruction on third degree assault. RP 414-417; CP 49-60. However, the court did give the defendant's proposed lesser included instructions on third degree assault. *Id.* After argument and deliberation, the jury returned verdicts of guilty on all counts. RP 498-504. The jury also found each firearm enhancement allegation proven and found every aggravating factor proven. CP 94-106.

The court later held a sentencing hearing in this case with both parties agreeing to the defendant's criminal history as well as to the defendant's

standard ranges. RP 510. After hearing from both parties, the court imposed a sentence of 24 months over the top end of the standard range based upon the jury's finding that the injuries had a foreseeable and destructive impact on other persons. RP 108-123, 126-129. The defendant thereafter filed timely notice of appeal. CP 147-148.

ARGUMENT

SUBSTANTIAL EVIDENCE DOES NOT SUPPORT ANY OF THE BURGLARY CONVICTIONS AND THE TRIAL COURT'S ACCEPTANCE OF THE JURY'S GUILTY VERDICTS ON THE BURGLARY CHARGES VIOLATED THE DEFENDANT'S RIGHT TO DUE PROCESS UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 3, AND UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT.

As a part of the due process rights guaranteed under both the Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment, the state must prove every element of a crime charged beyond a reasonable doubt. *State v. Baeza*, 100 Wn.2d 487, 488, 670 P.2d 646 (1983); *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073, 25 L.Ed.2d 368 (1970). As the United States Supreme Court explained in *Winship*: "[The] use of the reasonable-doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law." *In re Winship*, 397 U.S. at 364.

Mere possibility, suspicion, speculation, conjecture, or even a scintilla of evidence, is not substantial evidence, and does not meet the minimum requirements of due process. *State v. Moore*, 7 Wn.App. 1, 499 P.2d 16 (1972). As a result, any conviction not supported by substantial evidence may be attacked for the first time on appeal as a due process violation. Id. In addition, evidence that is equally consistent with innocence as it is with guilt is not sufficient to support a conviction; it is not substantial evidence.

State v. Aten, 130 Wn.2d 640, 927 P.2d 210 (1996).

"Substantial evidence" in the context of a criminal case means evidence sufficient to persuade "an unprejudiced thinking mind of the truth of the fact to which the evidence is directed." *State v. Taplin*, 9 Wn.App. 545, 513 P.2d 549 (1973) (quoting *State v. Collins*, 2 Wn.App. 757, 759, 470 P.2d 227, 228 (1970)). The test for determining the sufficiency of the evidence is whether "after viewing the evidence in the light most favorable to the prosecution any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 334, 99 S.Ct. 2781, 2797, 61 L.Ed.2d 560 (1979).

For example, in *State. v. Mace*, 97 Wn.2d 840, 650 P.2d 217 (1982), the defendant was charged and convicted of burglary. At trial, the state presented the following evidence: (1) during the evening in question, someone entered the victims' home in Richland without permission and took a purse, which contained a wallet and a bank access card, (2) that the card was used in a cash machine in Kennewick (an adjoining city), at 4:30 that same morning, (3) that the victim's wallet was found in a bag next to the cash machine, (4) that the bag had the defendant's fingerprints on it, and (5) that the defendant's fingerprints were also found on a piece of paper located by a second cash machine where the card was used.

Following conviction, the defendant appealed, arguing that the state

had failed to present substantial evidence to support the burglary conviction. The Court of Appeals disagreed, and affirmed. The defendant then sought and obtained review by the Washington Supreme Court, which reversed, stating as follows.

> Second degree burglary is defined as follows:
>
> > A person is guilty of burglary in the second degree if, with intent to commit a crime against a person or property therein, he enters or remains unlawfully in a building other than a vehicle.
> >
> > RCW 9A.52.030(1). We agree with petitioner that the State failed to sustain its burden of proof. The State's evidence proved only that petitioner may have possessed the recently stolen bank cards in Kennewick. ***There was no direct evidence, only inferences***, that he had committed second degree burglary by entering the premises in Richland.

State v. Mace, 97 Wn.2d at 842 (emphasis added).

In the case at bar the state charged the defendant with first degree burglary and three counts of second degree burglary. The former charge is defined in RCW 9A.52.020, which states as follows:

> (1) A person is guilty of burglary in the first degree if, with intent to commit a crime against a person or property therein, he or she enters or remains unlawfully in a building and if, in entering or while in the building or in immediate flight therefrom, the actor or another participant in the crime (a) is armed with a deadly weapon, or (b) assaults any person.
>
> (2) Burglary in the first degree is a class A felony.

RCW 9A.52.020.

The latter charges, Second degree burglary, are defined in RCW

9A.52.030, which states as follows concerning the definition for this offense:

> (1) A person is guilty of burglary in the second degree if, with intent to commit a crime against a person or property therein, he or she enters or remains unlawfully in a building other than a vehicle or a dwelling.
>
> (2) Burglary in the second degree is a class B felony.

RCW 9A.52.030.

In the case at bar, the issue presented in this argument is whether or not the state presented substantial evidence that the defendant "enter[ed] or remain[ed] unlawfully in a building" sufficient to be guilty of burglary. The evidence presented at trial demonstrated that on four separate occasions the defendant entered the Longview Fred Meyer store during regular business hours and on each occasion stayed within those areas specifically open to the public. Thus, the only way the defendant could be found to have entered or remained unlawfully would be if the record contains substantial evidence that he had been properly excluded from the store at the times he reentered. The state argued to the jury that Exhibit No. 13, which is the Trespass Notice dated "12/12/2009" put the defendant on notice of such an exclusion. As reference to the decision in *State v. Kutch*, 90 Wn.App. 244, 951 P.2d 1139 (1998), explains, this argument is incorrect and neither Exhibit No. 13 nor the testimony of the person who gave the defendant oral notice constitutes substantial evidence on this element of the offense.

In *Kutch,* supra, the defendant entered a mall with the intent to shoplift after a security guard from one of the stores and a police officer had given the defendant notice that he could not return to the mall property for one year. The defendant was later convicted of second degree burglary and appealed, arguing that the security guard and the police officer had not given him written notice of being banned from the property, and that absent written notice he could not be convicted of burglary. In addressing this issue, the court first noted that there was substantial evidence that the defendant was given written notice. However, the court went on to note the following concerning the argument that written notice was required:

> Contrary to the police report, Mr. Kutch claims he was not given a copy of the notice. He cites no authority that would require that he be given a copy. And we can find none. A verbal notice might just as adequately inform him that his invitation had been revoked.

State v. Kutch, 90 Wn.App. At 248.

The court then went on to state the following concerning the adequacy of the notice the defendant was given:

> The express revocation here included both time and place – one full year from mall premises. This was a valid limitation. The written revocation clearly informed Mr. Kutch he was not licensed, privileged, or otherwise invited to be on the premises. RCW 9A.52.010(3). We conclude Mr. Kutch was sufficiently notified that he was no longer invited into the mall as a member of the general public.

State v. Kutch, 90 Wn.App. At 248-249 (citation omitted).

Based upon these conclusions, the court affirmed the defendant's conviction.

The application and difference from the decision in *Kutch* and the facts in the case at bar are that in this case the state's evidence was specific that the defendant was not given a copy of the written notice. Rather, he was given oral notice by a Fred Meyer employee. However, unlike *Kutch* in the time restraint was specific (one year), the oral notice the Fred Meyer employee gave the defendant in this case was not legally sufficient because it neither banned the defendant forever or specified a time period. Rather, as the Fred Meyer employee twice testified, what he told the defendant in 2009 was that he was banned "indefinitely." This testimony was given on direct as follows:

> A. I told him that he would not be allowed back in the Fred Meyer store, or warehouse, or even on the property.
>
> Q. Indefinitely?
>
> A. Yes.

RP 165.

This testimony on the time frame was repeated on cross-examination as follows:

> Q. Just a couple of questions. Speaking about the – the trespass order, did you specifically state that it was indefinite, or was there just no – no timeframe talked about?

A. Yes, when I trespassed him, I told him he could not come back to the store indefinitely.

RP 167.

The problem with this notice is that "indefinitely" is not a time frame. In fact, *Webster's* provides the following definition for the word "indefinite":

> [N]ot definite; as **a:** typically designating an unidentified or not immediately identifiable person or think . . . **b:** not precise: vague **c:** having no exact limits.

Webster's New Collegiate Dictionary (1977), p. 584 (bold in original).

This notice was the equivalent to telling the defendant that he could not come back to the Fred Meyer store "for a while." In fact, it was "a while" before the defendant was next seen in the Fred Meyer store; actually, it was a long while - almost 15 months. Thus, the evidence adduced at trial failed to prove beyond a reasonable doubt that the defendant was still under any constraint preventing him from entering Fred Meyer's stores on any of the occasions listed in the third amended information. Thus, this court should reverse each of the burglary convictions and remand with instructions to dismiss those charges and resentence the defendant on the remaining charges.

CONCLUSION

For the reasons set out in this brief, this court should reverse the defendant's convictions for burglary and remand with instructions to dismiss those charges and resentence the defendant on the remaining convictions.

DATED this 18th day of March, 2013.

Respectfully submitted,

John A. Hays, No. 16654
Attorney for Appellant

APPENDIX

WASHINGTON CONSTITUTION
ARTICLE 1, § 3

No person shall be deprived of life, liberty, or property, without due process of law.

UNITED STATES CONSTITUTION,
FOURTEENTH AMENDMENT

All persons born or naturalized in the United State, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

. . .

RCW 9A.52.020
First Degree Burglary

(1) A person is guilty of burglary in the first degree if, with intent to commit a crime against a person or property therein, he or she enters or remains unlawfully in a building and if, in entering or while in the building or in immediate flight therefrom, the actor or another participant in the crime (a) is armed with a deadly weapon, or (b) assaults any person.

(2) Burglary in the first degree is a class A felony.

RCW 9A.52.030
Second Degree Burglary

(1) A person is guilty of burglary in the second degree if, with intent to commit a crime against a person or property therein, he or she enters or remains unlawfully in a building other than a vehicle or a dwelling.

(2) Burglary in the second degree is a class B felony.

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON DIVISION II

STATE OF WASHINGTON, **Respondent,**	**COURT OF APPEALS NO: 43440-7-II**
vs.	**AFFIRMATION OF SERVICE**
KRAMER, ADRIAN J., **Appellant.**	

STATE OF WASHINGTON)
) **: ss.**
County of Cowlitz)

CATHY RUSSELL, states the following under penalty of perjury under the laws of Washington State. That at all times herein mentioned I was and now am a citizen of the United States and resident of the State of Washington, over the age of eighteen and competent to be a witness and make service herein.

On **March 18th, 2013**, I personally placed in the mail and/or e-filed the following documents

1. BRIEF OF APPELLANT

to the following:

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Dated this 18TH day of March, 2013 at LONGVIEW, Washington.

/s/
CATHY RUSSELL
LEGAL ASSISTANT TO JOHN A. HAYS

HAYS LAW OFFICE

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